

1 NICHOLAS A. TRUTANICH  
2 Nevada Bar Number 13644  
United States Attorney  
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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,

2:17-cr-00361-HDM-(NJK)

9 Plaintiff,

Government's Application for an Order  
10 v.  
Deeming the Attorney-Client Privilege  
Waived

11 EZEQUIEL PENA-VERA,

12 Defendant.

14 The United States of America, by and through NICHOLAS A. TRUTANICH, United  
15 States Attorney, and WILLIAM R. REED, Assistant United States Attorney, respectfully  
16 requests that this Court enter an order deeming the defendant's attorney-client privilege in the  
17 above-captioned case waived with respect to Monique Kirtley, Esq.

18 This order is sought for the following reasons:

19 1. Defendant Ezequiel Pena-Vera has filed a motion pursuant to 28 U.S.C. § 2255 to  
20 vacate, set aside, or correct sentence by a person in federal custody in the above-captioned case.  
21 ECF No. 37. The Court ordered the government to respond to Pena-Vera's motion, and that  
22 response is currently due April 29, 2019. ECF No. 40.

23 2. In his motion, Pena-Vera implies his trial attorney provided ineffective assistance  
24 of counsel by failing to collaterally attack his prior removal from the United States, which was

1 based on a criminal conviction in California. *See* ECF No. 37. Defendant also alleges “counsel  
2 failed to file an appeal even when requested to do so by [defendant].” *Id.*, at 4; *see also id.* at 5.

3       3. Access to information from defendant’s former counsel, Monique Kirtley, is  
4 necessary to respond to the allegations in defendant’s § 2255 motion.

5       4. The government requests that this Court issue an order deeming the attorney-client  
6 privilege in 2: 17-cr-00361-HDM-(NJK) waived for the purposes of this proceeding as to all  
7 contentions raised in defendant’s motion, and ordering all materials and information related  
8 thereto be divulged to the government.

9       5. The voluntary disclosure by defendant of privileged communications and his  
10 complaints regarding Ms. Kirtley constitute waiver of the privilege as to all other such  
11 communications on the same subject. *Weil v. Investment/Indicators, Research & Management*, 647  
12 F.2d 18, 24 (9th Cir. 1981); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985),  
13 cert. denied, 475 U.S. 1109 (1986).

14       Even when a party does not explicitly disclose the content of an  
15 attorney-client communication, he may waive the privilege implicitly.  
16 A person cannot always claim that he relied on counsel, while  
protecting what was said between them from disclosure. As we have  
said, “The privilege which protects attorney-client communications  
may not be used both as a sword and a shield. Where a party raises a  
claim which in fairness requires disclosure of the protected  
communication, the privilege may be implicitly waived.” (citations  
omitted).

19       *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir.), cert. denied, 522 U.S. 851, 118 S.Ct. 141  
20 (1997).

21       WHEREFORE, based on the foregoing, the government respectfully requests that the  
22 attorney-client privilege in 2:17-cr-00361-HDM-(NJK) be deemed waived as to those matters  
23 Pena-Vera has put at issue in his motion to vacate, set aside or correct sentence. The government  
24 respectfully requests that this Court order Ms. Kirtley to provide the government with an affidavit

1 or declaration, as well as any relevant materials and information, addressing the allegations and  
2 matters raised in Pena-Vera's motion, within 30 days after the date of the Court's order.

3 DATED this 26th day of March, 2019.

4 Respectfully submitted,

5 NICHOLAS A. TRUTANICH  
6 United States Attorney

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8 /s/  
9 WILLIAM R. REED  
Assistant United States Attorney

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## CERTIFICATE OF SERVICE

It is hereby certified that pursuant to LCR 47-11 service of the foregoing Application for an Order Deeming the Attorney-Client Privilege Waived was made through the Court's electronic filing and notice system (CM/ECF) or, as appropriate, by sending a copy of the same by first class mail, addressed to the following addresses:

Monique Kirtley, Esq.  
Assistant Federal Public Defender  
411 E. Bonneville, Suite 250  
Las Vegas, NV 89101

Ezequiel Pena-Vera  
Federal Register Number 54452-048  
USP Lompoc  
3901 Klein Blvd.  
Lompoc, CA 90731-0207  
(last known address)

DATED this 26th day of March, 2019.

/s/  
WILLIAM R. REED  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

2:17-cr-00361-HDM-(NJK)

Plaintiff,

V.

EZEQUIEL PENA-VERA,

## ORDER

**Defendant.**

Based upon the pending application of the government, and good cause appearing,

**IT IS HEREBY ORDERED** that the attorney-client privilege in 2:17-cr-00361-HDM-

(NJK) between the defendant and Monique Kirtley, Esq., shall be deemed waived for all

purposes relating to defendant's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or

correct sentence by a person in federal custody. Ms. Kirtley shall, within 30 days of this order,

provide the government with an affidavit or declaration concerning all information known by

related to the contentions raised in defendant's motion. Further, Ms. Kirtley may communicate

with government counsel and provide supporting documentation regarding all matters put at

issue in defendant's motion

DATED this 22 day of April . 2019

Howard D McFadden

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## UNITED STATES DISTRICT JUDGE